No. 88-922

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

KATHRYN A. HEILY,
Petitioner,

VS.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., et al.,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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6 pp

TABLE OF AUTHORITIES CITED

Cases

	Page
Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986)	3
Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954)	3
Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803)	3
Patton v. Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947)	3
Perry v. Thomas, 482 U.S. ____, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)	2
Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, 698 (1975)	3

Statutes

9 U.S.C. § 2	2

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The issue in this case is due process of law, nothing more and nothing less. Must arbitrators hearing cases under the Federal Arbitration Act be free of actual bias against a party appearing before them? Stripped of its rhetoric, Merrill Lynch's response to this question is "no." Merrill Lynch urges this Court that plaintiffs leave their constitutional right to a fair hearing at the door when they walk into an FAA arbitration, and can *never* effectively challenge a proposed arbitrator for actual bias. This Court has repeatedly struck down procedures leading to such an unjust result.

Tellingly, in its statement of the case, Merrill Lynch ignores the previous writ proceeding in the Court of Appeal and ignores the order of the California Supreme Court granting review, which relied on three cases in which *actual* bias was referenced as justification for refusing to compel arbitration. (App. "D" to Petition) In spite of those references, the issue of *actual* bias was skirted by Merrill Lynch and never reached by the Court of Appeal below. Now, Merrill Lynch's "Questions Presented" in its opposition mischaracterizes Heily's objection to NYSE arbitration as founded on *presumptive* bias. To the contrary, the re-

porter's transcript demonstrates the trial court's conclusion that it was pre-empted from even considering evidence of *actual* bias against Heily by the NYSE. Actual bias has never before been addressed by this Court in the context of a pre-arbitration challenge under the FAA. This issue is raised squarely in this case, and it should now be resolved.

Moreover, Merrill Lynch's opposition plainly acknowledges the seriousness and ripeness of the federal pre-emption issue which Heily has raised. (Opp., pp. 15-24) Very much like the published opinion below, Merrill Lynch treats this issue for what it is: a matter of significant national import, of considerable sensitivity for the interrelationship between federal and state law, and of first impression in this Court, notwithstanding footnote 9 in *Perry v. Thomas*, 482 U.S. ____, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). Although there is a sharp difference of opinion as to the correct result, the parties agree about the importance of resolving this issue.

The pressing need for a review is also dramatically illustrated by Merrill Lynch's basic thesis—that the arbitration procedures in question have an impervious federal shield against "state-law attacks on their fairness. . . ." (Opp. p. 20) Professing amazement and alarm, Merrill Lynch warns that Heily's position herein might actually leave room for legal challenges and outcomes that "vary from state to state," and might even—perish the thought—"vary from *case* to *case*. . . ." (*Id.*) (Alarmed emphasis in original) Merrill Lynch—and the recent decisions it defends—would completely abrogate the federal/state sharing of legal control that Congress envisioned.

This is not the time and place for a detailed rejoinder to Merrill Lynch's defense of its position on the merits. But, two observations are appropriate: First, Congress deliberately left room for state-law challenges to arbitration agreements by specific language in the Federal Arbitration Act, 9 U.S.C. § 2; Second, there are innumerable bodies of federal law which likewise leave room for state-by-state and case-by-case differences in outcome. Merrill Lynch, however, would stifle the role Congress intended to allow for state-law challenges to FAA arbitrations.

The lower courts are missing this crucial issue, which concerns the heart of federalism. Its importance calls for a grant of certiorari in this case. The record squarely raises the issue, as Merrill Lynch concedes.

In addition to the pre-emption issue, however, this case also raises a fundamental question about *federal*-law fairness requirements in the arbitration setting. The issue is due process of law, which requires nothing less than notice and an opportunity to be heard by a fair and *impartial* tribunal. This Court, from its inception, has upheld this right, and is asked to uphold it again now.

Judges must recuse themselves if they have even a shadow of bias against a litigant before them, as this Court reaffirmed in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). Fairness and lack of bias in juries is "critical to public confidence in the fairness of the . . . justice system." *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, 698 (1975). Accordingly, this Court has struck down procedures resulting in the exclusion from juries of blacks, *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947), persons of Mexican descent, *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), and women, *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). If the Constitution is offended by the mere appearance of bias in judges and juries, surely it will not brook *actual* bias in arbitrators.

Congress simply did not, and *could not*, write the Constitution out of the Federal Arbitration Act when it gave oversight authority to the SEC. It is exclusively the role of the judiciary to examine the result in this case to determine if it passes constitutional muster. *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). Any system which purports to be insulated from effective challenges to triers of fact based on sworn evidence of actual bias offends the Constitution. Merrill Lynch's argument, and the published opinion below, thus offend the Constitution.

Again, Merrill Lynch's response to this issue only dramatizes the importance of granting certiorari. Merrill Lynch dismisses the significance of this entire matter with the unblushing remark that

only a "few arbitration forums [are] overseen and approved by the SEC under the 1934 Act . . . ." (Opp. p. 14) There, in such supposedly *de minimis* settings as the New York Stock Exchange, Merrill Lynch seriously urges upon this Court an absolute rule of *federal* law that no arbitration demands can be resisted on fairness grounds. Merrill Lynch suggests that fairness will always be ensured "later," through the extremely circumscribed judicial review of arbitral awards. This Court has never been satisfied with such hollow assurances.

The lower court decisions in this case demonstrate one thing very clearly. There is a disturbing and dangerous confusion about the intended legal consequences of the SEC's oversight of securities industry arbitrations. Are the only effective state-law remedies thereby pre-empted? Are federal and Constitutional fairness guarantees thereby denuded of any significance? Although Merrill Lynch has an obvious interest in an affirmative answer to both questions, there are powerful legal and political traditions in this nation which militate otherwise.

This reply will not respond to the numerous insults and distortions of the record in Merrill Lynch's opposition. The sole question now presented is whether this case is important enough for a review. Merrill Lynch's opposition confirms that it is. A writ of certiorari should be granted.

Respectfully submitted,

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